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AUTHOR Daniel, George H.
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ABSTRACT

One of the most serious impediments to the development of high quality education in the United States is excessive legalism. This legalism takes two forms: administrative legalism is the trend toward ritualistic conformity to increasingly detailed, bureaucratic rules and regulations; judicial legalism is the tendency to cast all social issues and disputes into a due process or litigious framework. The numbers of lawyers and court cases in the United States have increased dramatically in recent years. The effects of litigation and the threat of litigation upon school administrators have been to reduce administrators' authority over final decisions and to encourage administrators to adopt the policies and take the actions that are least likely to be challenged in court. Nonassertive administration is thus rewarded, bold initiatives for excellence are discouraged, and individual rights are given precedence over the general social good. School officials tend to respond to the risk of being sued in five ways: through inaction, delay, formalism, changing the character of decisions made, or reversing decisions under legal duress. The threat to effective educational leadership is significant enough to merit serious attention and research. (PGD)

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LEGALISM AS AN OBSTACLE TO SCHOOL QUALITY

Presented By

DR. GEORGE H. DANIEL
Superintendent
Bound Brook Public Schools
Bound Brook, New Jersey

to

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Legalism as an Obstacle to School Quality

by George H. Daniel

March 11, 1985

Dallas, Texas

Recent national reports have emphasized that our public schools need much improvement. The current movement to upgrade the quality of our educational institutions will require us to focus our attention and resources of time and money in meeting those educational goals which can be achieved in our schools. Unfortunately, the various national reports on educational excellence did not address one of the most serious impediments to quality schools, i.e. excessive legalism within our society and the extreme emphasis upon individual rights at the expense of social purpose in the operation of our institutions. During the next 15 minutes, I intend to develop the theme that our public schools as social institutions dedicated to meeting the needs of individuals as well as the larger society require some freedom to function without excessive legalism and constant threats of lawsuits and interference by outside reviewing agencies. We will explore some of the trends which weaken the ability of public school officials to make professional decisions which enhance school quality.

The unique strength of American education has developed through local responsibility and initiative and a diversity of approaches in meeting individual community,institutional and student needs. A combination of local representative governance and professional educational expertise has produced the only "lighthouse" school districts which have existed.

Today, wherever one finds an outstanding school district or school, whether in the suburbs, the cities, or rural areas, one also finds an outstanding educational leader, as a superintendent or principal. In the inner cities, in particular, the truly exceptional schools have an exceptional principal at the helm; one who knows how to assess needs, identify problems, marshal resources, plan strategies and motivate personnel to implement appropriate action to solve problems.

There can be little doubt about the essential nature of local public school leadership. Yet are we encouraging leadership in school districts? Unfortunately, we are not. Increasingly, the scope of decision-making has been restricted and narrowed so much that local school personnel are all too frequently prevented from exercising professional discretion. To a significant degree, local school leaders control a diminishing portion of our school resources of time and funds.

As Stanford University Professor Michael Kirst has noted, "During the past decade the discretionary decision zone of local superintendents and boards became squeezed progressively in a smaller and smaller area. From the top, the squeeze was put on by the growth of federal and state governments and the courts and from the bottom by the growth of local collective bargaining contracts and advocacy groups."

Legalism

Arthur Wise, in his book Legislated Learning, documented the trends toward centralization, bureaucratization, and legalism of the public schools. Many social policy issues and structural arrangements within our government impact upon local schools, but perhaps none has greater

significance than administrative and judicial legalism.

Legalism may be defined as "strict conformity and/or excessive emphasis upon the law." The law, of course, involves statutory law with its accompanying administrative rules and regulations and the common law which derives from judicial or quasi-judicial decisions obtained through due process proceedings.

Excessive legalism in the public schools is being driven by two powerful thrusts in our society. One is our bureaucratic reliance on rules and regulations on the assumption that educational improvement rests in increasingly detailed and precise specification of school practice. Therefore, one definition of legalism is "ritualistic conformity" to bureaucratic rules and regulations. One commentator observed that "legalization of public schools may result in formally correct decisions which nonetheless ignore the real interests at stake. It imposes inflexibility which makes adjustments to changing conditions more difficult."

One may term this trend as administrative legalism.With numerous statutes and regulations, you must have monitors or inspectors to determine compliance and lawyers to argue language interpretations, etc. The more remote the rule-maker from the operating conditions, the more difficult becomes the application of the rule in a relevant fashion. In some cases, the rules have little or no relationship to school or community needs, but somehow compliance must be attained. Today, in all too many instances administrative legalism reigns dominant over questions of educational need, quality, or effectiveness.

Judicial Legalism

The second type of legalism may be termed "judicial

legalism", i.e. the tendency to cast all social issues and disputes into a due process or litigious framework. There is much evidence that schools are being inundated with due process procedures, lawsuits and threats of lawsuits.

Linda Stamato and Sanford Jaffe, in the February issue of the New Jersey Monthly presented an overview of the litigation explosion in the United States. Increasing numbers of Americans are going to court with the result that the growth of civil litigation has been so dramatic that the caseload threatens to engulf sizeable areas of judicial operation. During the past 20 years, the increase in civil cases filed in federal court - from 59,280 cases in 1960 to 168,780 in 1980 - reveals a surge of 185%. By comparison, the nation's population rose by 25%.

In 1974, we spent $11 billion on legal fees. In 1984, we spent $34 billion, more than a 300% increase. Describing the growing tendency to solve problems by judicial means, Chief Justice Warren E. Burger said, "The 'enemy' may be our willingness to assume that the more refined and deliberate the procedure, the better the quality of justice which results." He termed it "possible" that lawyers and judges, "aided and abetted by the inherently litigious nature of Americans" have tended to "cast all disputes into a legal framework that only legally trained professionals can deal with in traditional legal ways."

Jerold Auerbach writes in his book Justice Without Law, "Laws and lawyers have proliferated so rapidly as to suggest (even to lawyers) that American society is choking from legal pollution, that Americans as a people are debilitated by the malady of 'hyper lexis'. Five hundred years from now, when historians sift through twentieth-century artifacts, they doubtless will have as little comprehension of American legal piety as most Americans now display toward

medieval religious zeal. The analogy is illuminating; law is our national religion, lawyers constitute our priesthood; the courtroom is our cathedral, where contemporary passion plays are enacted."

Let me say here that I approach this topic reluctantly and with considerable trepidation. I have been conditioned from an early age to have awe of the power and authority of our judicial system, and I have much respect for the great majority of those intelligent and articulate professional persons who practice law.

I should also observe that I have a healthy respect for the benefits that vitamins can provide for the human body. However, excessive emphasis upon legalism and due process can be compared to excessive doses of vitamins - a proper amount is essential for good health; however, an overdose of certain vitamins can poison the patient.

Former U.S. Supreme Court Chief Justice Charles Evans Hughes called the United States "the greatest law factory the world has ever known?" Currently two-thirds of the world's lawyers practice in this mammoth American industry. And the growth continues at staggering proportions. In New Jersey in 1961, there was one lawyer for every 844 residents. Today, there is one lawyer for every 280 residents, a three hundred percent increase.

Nationally, on a per-capita basis, we have five times as many lawyers as Germany, 10 times as many as France, and 20 times as many as Japan.

The situation has become so apparent that it has attracted the attention of humorists. New York Times columnist Russell Baker proposes that American lawyers be exchanged for Japanese automobiles to correct a serious trade imbalance. John McLaughlin, in his Star Ledger column, "New York, New York", observes that when New Yorkers

find themselves in disagreement they reach for their lawyers the way actors in cowboy movies reach for their six-guns, and the results are usually the same: carnage!

As Ivan Gluckman pointed out in Education Week, one factor that undoubtedly plays a major role in weakening teacher quality and student discipline is the increased amount of litigation brought by teachers and students against school districts and their administrators.

The largest number of suits are brought under one statute, the Civil Rights Act of 1871 (Section 1983), a Reconstruction-era law intended to protect the rights of newly freed slaves. It was resurrected in the 1960's as a means to bring suits for monetary damages against state and local officials for almost anything which could be construed as an interference with an individual's Constitutional rights. Buttressed by another federal statute - the Civil Rights Attorney Fees Act of 1976, which orders the award of attorney's fees to victorious plaintiffs in civil rights cases - these suits make up the largest class of civil actions based on the United States Code.

The consumer-advocate, Peter Schuck, in his book, Suing Government, says the number of civil rights suits in federal courts grew from 280 in 1960 to more than 27,000 in 1980 - an increase of 9600%. This litigation explosion is already having dire consequences for those local school administors who are endeavoring to make decisions which enhance the quality of public education.

Due Process

Harry Truman used to have a sign on his desk which read "The Buck Stops Here!". Can you imagine a sign like that in a public school setting? The buck seldom stops anywhere in the public schools (particularly in New Jersey).

Why? Because nearly every decision is appealable through lengthy due process proceedings. And all too frequently, quality decisions are precluded by statute, administrative regulations, or the common law.

When frequent litigation affects an institution, one may logically ask "Who is in charge here?" Fenwick English often tells the story that when he was an assistant superintendent for curriculum a board of education member complained that his daughter was being taught the same subject two years in a row. Fenwick had a great desire to reply,"What you say has a lot of merit. There's just one thing you're mistaken about. YOU THINK I'M IN CONTROL OF THE SITUATION."

Who really is in charge of our public schools? In theory, school boards decide policy within state guidelines and administrators perform day-to-day management. However, all too frequently, administrative law officials, labor relations boards, civil rights agencies and state and federal courts appear to be "in charge". Unfortunately, with numerous appeals one usually has to wait from two to three years to receive any sort of definitive decision from the third party agencies. In the meantime, the real social purposes of the institution languish in conflict and uncertainty. And valuable time and money resources are expended upon essentially unproductive legalistic maneuvering.

Since litigation is very expensive both in time and money, not to mention the public embarrassment of an adverse ruling, most local authorities spend much time and effort in attempting to avoid legal challenges.

Local school officials study court decisions and make every attempt to be aware in advance of any trends in litigation in order to minimize the liklihood of a challenge

and an adverse ruling. Constant scrutiny of publications, attendance at law clinics, and frequent consultations with one's attorneys are now absolute essentials for survival. Unfortunately, judicial decisions, especially at the lower levels, are often unpredictable. In many situations, two or more attorneys will give you contradictory advice on the same legal precedents and factual circumstances. In New Jersey, where one encounters administrative law judges, who are not always trained as lawyers, the decisions are even less predictable.

The legal and judicial environment which surrounds the public schools rewards non-assertive administration which seldom makes bold initiatives or clear-cut decisions on behalf of school quality. Those administrators who exercise leadership for quality are promptly stymied by an immediate legal challenge (often by a union attorney), with the accompanying adverse publicity, legal expense, political liabilities and prospects for an adverse ruling by a third party official who has little or no interest in a quality school system.

Society has an interest in encouraging public officials to act legally but also to act promptly, decisively, and without excessive self-protection in accomplishing the public's business in socially efficient, cost minimizing ways. Peter Schuck describes this as the achievement of social purpose by vigorous decisionmaking. "We want policemen to follow up on suspicious behavior, teachers to maintain discipline in their classrooms, social workers to act decisively to protect abused children, prison guards to quell disorder... and supervisors to discharge irredeemably incompetent or malingering employees...".

Court decisions that have dramatically expanded official liability for damages most completely sacrifice vigorous

decisionmaking for essential social purpose, in exchange for claims of individual rights. By concentrating the costs of litigation and liability upon individual, public officials rather than spreading those costs through the public sector (i.e. the government) public tort law exacts a high price. The damage remedy against individual officials chills subjective decisionmaking and none of the adjustments, such as free legal defense, insurance, or 'good faith' immunity can restore that vigor.

How do officials actually respond to the risks associated with being sued. Their responses can be grouped into five general categories: inaction, delay, formalism, a change in the character of decisions, and decision reversal under legal duress.

Inaction - When school officials perceive that performing their legal duty may adversely affect their professional reputation and risk personal financial penalties and costs, they may simply refrain from acting. The failure to act may not be readily discernable to others, as the decision may be discretionary or the circumstances may conceal the real reason for the inaction. And, such inaction may primarily harm people who are likely to remain passive. A teacher's failure to discipline disruptive students may sacrifice the interests of their classmates, but students may be reluctant to question the teacher's authority. One authority on law and education suggests that as a result of the Supreme Court's decision in Wood v. Strickland which made it more difficult for school personnel to invoke a 'good faith' immunity, teachers may be less likely to make controversial decisions, such as disciplining rowdy students.

Delay - Officials may not want to risk inaction, but instead choose delayed action. Subordinate officials can

insist upon receiving approval from their superiors before taking action. Officials may decide to consult with legal counsel for each decision or even require formal legal opinions before acting. Delay may also take the form of additional perfunctory factual investigations prior to decisions. Actions delayed in some circumstances can mean opportunities forever foreclosed: parental child abuse that can never be wholly remedied, a disrupted learning environment that cannot be restored, etc. Delay may threaten the public's interests as much as inaction.

Formalism - Official actions are channeled into formal procedures with painstaking documentation. Officials maintain elaborate records and require their subordinates to do the same. Flexible procedures are formalized and reduced to writing. A study of a new special education program found that partly in order to avoid costly recriminations from parents, teachers routinized and bureaucratized the student evaluation process by substituting formal procedures for the individual assessments and parental involvement that the statute had envisioned. Formalism can also be expressed by the phrase "That's not my job, man!". i.e. strict compliance with written job descriptions and the absence of professional volunteerism to enhance quality. Formalism often leads to legalism. As officials learn to find a secure haven from liability in legalism, rules and procedures assume ever more importance in the bureaucratic scheme of things. Officials come to regard both the public and staff not merely as citizens, or employees but as potential adversaries and litigants. (An example - the practice of defensive medicine.)

Changes in the character of decisions - Officials wishing to avoid litigation may substitute one kind of

action for another. In particular, they may substitute relatively riskless acts for more risky ones. Supervisors may promote or give glowing recommendations to incompetent or disruptive employees rather than invite a suit for wrongful dismissal. When the union makes a claim of privilege or right for an employee, grant it and you will most often avoid litigation. When a parent or student makes a demand in opposition to school standards, sometimes it is easier to give in rather than run the risk of legal expenses.

This type of decisional transformation is accelerated in a political and bureaucratic atmosphere that penalizes risky actions when they fail, and the conditions of public life systematically aggravate that tendency.

Decision reversal - Hardly a week goes by without several local school officials being told that unless they reverse a recent decision a suit will be filed. In potential or real public litigation, plaintiffs now commonly allege that their discharge or other form of discipline was politically motivated and without constitutionally required procedures, allegations that ordinarily suffice to force public officials to go to trial without assurance of any immunity. With or without constitutional issues, many school boards and school administrators are reversing their decisions under legal duress.

We are unlikely ever to learn how often officials engage in self-protection and how much of this risk-minimizing behavior can fairly be attributed to fear of litigation. We cannot calculate the social cost of such tactics; nevertheless, there are strong reasons to regard official self-protection as a significant and growing problem. The Supreme Court's recent liability-and remedy-

expanding decisions have unquestionably strengthened the already powerful incentives for official self-protection. The risks of being sued and of incurring substantial costs have increased markedly.

Let me tell you how bad it really is. If you in good conscience determine that there is an intolerable situation in your school system, and consequently file tenure charges against an employee, every effort will be made by the defense attorney to raise any conceivable constitutional issue in federal court. If the tenure charges are dismissed in the state proceedings, you are likely to be liable in federal court for payment of the employee's legal fees and even possibly compensatory or punitive damages. Bear in mind that the mere filing of charges without any penalty may be interpreted as a violation of civil rights. The federal courts are awarding legal fees at the rate of $150 per hour for a highly inflated number of hours. We used to think that the filing of tenure charges would cost $20,000 to $30,000. Today, if you lose the case, the total cost may exceed $100,000.

One of the situations which you may encounter soon is the case of the employee who anticipates that disciplinary measures are about to be invoked and who immediately issues an outrageous public statement criticizing the district or its leadership. If disciplinary actions are then taken, the employee's attorney will then claim a violation of free speech. You will be amazed how often that tactic will work under the current system.

So, there you have it - the ultimate deterrence to school quality. Those local administrators and districts who try to uphold standards or improve schools run a considerable risk of punishment for their efforts. Those

few teachers or other employees who are excessively absent, who disrupt school, who insult supervisors, who are incompetent, who mistreat children, etc., may be wrapped in a blanket of constitutional protection and, in some cases, may be rewarded financially for their poor performance or unacceptable behavior. Even Orwell did not predict such perverse cause and effect relationships.

Putting aside the question of reasonable justice for school officials, we must realize that we cannot have quality public schools within a context of intimidation and punishment of those who are providing leadership for improvement. With national commission reports lamenting mediocrity in our schools, we cannot afford such a hostile environment for either leadership or improvement.

Ladies and gentlemen, the time has come for us to address this issue openly and honestly. We all value our constitutional liberties and responsibilities; however, they should not be distorted into a vehicle to undermine our invaluable institutions, such as the public schools. I am concerned that with the drift of current trends that process already is well underway at this time.

The legal system of this country is much like an ever expanding amoeba which engulfs everything in sight, then divides into two organisms, and then proceeds to flow over every other organism in the area at twice the previous speed. Many of our institutions are being altered irretrievably by this process and many persons will attest to the deterioration of effectiveness and efficiency which inevitably follows.

It is particularly important that research studies be conducted concerning the impact which legalism has upon the public schools. At the present time no one even knows

the number of cases which are being decided each year by the administrative law processes, the civil rights agencies, the labor relations boards, the various levels of the courts, etc. It's about time that a critical review of these activities be conducted.

Legalism which becomes an obstacle to school quality represents a formidable challenge both in terms of citizenship and in leadership for school administrators and board members.

John J. Patrick in an article in Educational Leadership has indicated that, "Citizenship in a free society is paradoxical and contradictory. It entails both obedience and constructive skepticism, respect for authority and constructive criticism of authorities. Good citizens in a free society are both compliant and independent."

Educators in local communities have parallel citizenship responsibilities to comply with statutes, State education regulations and court decisions within local school districts, and yet, at the same time, to remain sufficiently independent to examine critically this legalistic environment as it affects school quality. We must analyze conditions around us and advocate change in our laws and regulations and judicial practices where change is needed.

And above all, we must retain the opportunity and personal capacity for initiating the creative actions by which the vitality and renewal of our institutions and our society are sustained. Nothing less than the survival of quality local public schools is at stake.

/kc